

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THIRD FEDERAL SAVINGS BANK,	:	
	:	CIVIL ACTION NO. 02 cv 4403
Plaintiff	:	
	:	
vs.	:	
	:	
RW PROFESSIONAL LEASING	:	
SERVICES CORP.,	:	JURY TRIAL DEMANDED
	:	
and	:	
	:	
BARRY DRAYER,	:	
	:	
Defendants	:	

MOTION OF DEFENDANTS TO STAY OR DISMISS

Defendants, RW Professional Leasing Services Corp. and Barry Drayer, by and through their undersigned counsel, Fitzpatrick Lentz & Bubba, P.C., move this Court for an order staying or dismissing this action and, in support thereof, aver as follows:

1. This matter was initiated by the filing of a Complaint on July 2, 2002 by Plaintiff, Third Federal Savings Bank ("Third Federal").
2. The Defendants named in this suit are RW Professional Leasing Services Corp. ("PLS"), alleged to be a New York corporation with its principal place of business in New York, and Barry Drayer, an individual who resides in a state other than Pennsylvania.
3. Jurisdiction over this action is premised upon diversity of citizenship under 28 U.S.C. §1332(a).
4. The Complaint alleges, among other things, that PLS is engaged in the business of direct financing leases of medical, computer and other equipment for healthcare providers, such

as private physicians, outpatient facilities, and non-physician medical service providers. (Complaint ¶6).

5. The Complaint further alleges that PLS has entered into thousands of leases with healthcare providers, and has financed those leases through hundreds of different banking institutions, including Plaintiff, Third Federal. (Complaint ¶7).

6. The Complaint further alleges that leases were sold and assigned to Third Federal, and were serviced by PLS pursuant to sale and service agreements. (Complaint ¶8).

7. The Complaint further alleges that the leases to be serviced by PLS were also assigned to Third Federal. (Complaint ¶10).

8. In addition, the Complaint alleges that each service agreement was accompanied by a promissory note from PLS to Third Federal. (Complaint ¶15).

9. The Complaint alleges that, as a result of a revenue slow down experienced by PLS, combined with increased delinquency rates and reduced financing opportunities beginning in 1999, PLS allegedly failed to make payments when due to Third Federal. (Complaint ¶20).

10. Moreover, it is alleged that PLS committed other acts in violation of agreement between the parties and, at some point in time, both failed to make payments to Third Federal and concealed facts relating to PLS' obligation to make such payments or events of default under the agreements.

11. As a result of these acts, Third Federal has filed the instant Complaint, asserting seven counts against the Defendants as follows:

Count I – Breach of Contract against PLS

Count II – Breach of Contract against PLS

Count III – Fraud against PLS and Drayer

Count IV – Negligent Misrepresentation against PLS and Drayer

Count V – Aiding and Abetting Fraud against Drayer

Count VI – Breach of Fiduciary Duty against PLS and Drayer

Count VII – Aiding and Abetting a Breach of Fiduciary Duty against
Drayer

12. Premised upon the allegations in the Complaint, Third Federal seeks judgment in its favor and against PLS and Drayer in an amount in excess of \$836,000, together with exemplary and other damages.

13. Upon information and belief, on June 13, 2002, an action was initiated in the United States District Court for the Eastern District of New York entitled Crawford & Sons, Ltd. Profit Sharing Plan, et al. v. Rochelle Besser, et al., Index No. 02-CV-3442 (ADS) (“the New York Action”). A true and correct copy of the docket entries in the New York Action is attached hereto as Exhibit “A” and is incorporated herein by reference.

14. Upon information and belief, at some point thereafter, on or about July 12, 2002, an Amended Complaint was filed in the New York Action. A true and correct copy of the Amended Complaint in the New York Action is attached hereto as Exhibit “B,” and is incorporated herein by reference.

15. The Amended Complaint in the New York Action lists numerous entities as plaintiffs. Included among the plaintiffs in the New York Action is the Plaintiff herein, Third Federal Savings Bank.

16. Among the defendants in the New York Action are the Defendants herein, PLS and Drayer.

17. The Amended Complaint in the New York Action purports to state claims against the defendants therein under the Racketeer Influenced and Corrupt Organizations Act (“RICO”),

18 U.S.C. §§1961 et seq., as well as claims for common law fraud and to collect certain promissory notes.

18. The Amended Complaint in the New York Action purports to set forth six claims against the Defendants, including PLS and Drayer, as follows:

First Claim RICO §1962(c) against all Defendants

Second Claim RICO §1962(a) against all Defendants

Third Claim RICO §1962(b) against all Defendants

Fourth Claim RICO §1962(d) against all Defendants

Fifth Claim Common Law Fraud against all Defendants

Sixth Claim Collection of Promissory Notes against PLS.

19. In all relevant and material ways, the New York Action is identical to, or involves the same subject matter as this action, and arises out of the same nucleus of operative facts as does this action.

20. The New York Action was initiated prior to this action.

21. The New York Action includes the Plaintiff herein, Third Federal, as a plaintiff and the Defendants herein, PLS and Drayer, as defendants.

22. The New York Action involves the identical issues as are before the Court in this action; to wit, the obligations of PLS and Drayer arising out of the parties' business relationship in connection with the financing, sale and servicing of leases.

23. The pendency of both this action and the New York Action presents a situation where duplicative litigation is unavoidable and where there exists a risk of inconsistent results.

24. Under the "first-filed rule," this Court, for the reasons more fully set forth on the accompanying Memorandum of Law, should dismiss or stay this action.

WHEREFORE, RW Professional Leasing Services Corp. and Barry Drayer respectfully request that this Court enter an Order dismissing or, in the alternative, staying the instant proceeding pending the disposition of the pending action in the United States District Court for the Eastern District of New York, involving the same parties and issues, and that they have such other and further relief as is just and equitable.

FITZPATRICK LENTZ & BUBBA, P.C.

Date: November 7, 2002

By: _____/S/
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Attorney for Defendants

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BARRY DRAYER,	:	
	:	
Defendants	:	

CERTIFICATE OF SERVICE

I, DOUGLAS J. SMILLIE, hereby certify that a true and correct copy of the Motion of Defendants to Stay or Dismiss has been filed electronically and is available for viewing and downloading from the ECF System. In addition, a true and correct copy was served upon counsel for Plaintiff at the following address, by regular U.S. Mail, postage prepaid, upon the following:

Andrew W. Bonekemper, Esquire
Fox Rothschild O'Brien & Frankel, LLP
1250 South Broad Street
Lansdale, PA 19446

FITZPATRICK LENTZ & BUBBA, P.C.

Dated: November 7, 2002

By: _____/S/
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